

1 Gerald E. Hawxhurst (Bar No. 220327)

jerry@cronehawxhurst.com

2 Daryl M. Crone (Bar No. 209610)

daryl@cronehawxhurst.com

3 CRONE HAWXHURST LLP

10880 Wilshire Blvd., Ste. 1150

4 Los Angeles, California 90024

Telephone: (310) 893-5150

5 Facsimile: (310) 893-5195

6 Attorneys for Defendants

Innovation Ventures, LLC (sued erroneously

7 as Innovation Ventures, LLC dba

Living Essentials); Living Essentials, LLC;

8 Manoj Bhargava; and Bio Clinical Development, Inc. (sued erroneously as

9 Bioclinical Development, Inc.)

10 UNITED STATES DISTRICT COURT

11 CENTRAL DISTRICT OF CALIFORNIA

12
13 ILYA PODOBEDOV, JORDAN
14 MOUSSOUROS and RICHARD N.
JAMES, on behalf of themselves and all
15 others similarly situated,

16 Plaintiffs,

17 vs.

18 LIVING ESSENTIALS, LLC,
19 INNOVATION VENTURES, LLC d/b/a
LIVING ESSENTIALS, MANOJ
20 BHARGAVA and BIOCLINICAL
DEVELOPMENT, INC.,

21 Defendants.

CASE NO. LACV11-6408 PSG (PLAx)

**DEFENDANTS' ANSWER TO THE
FIRST AMENDED COMPLAINT**

1 Defendants Manoj Bhargava and Bio Clinical Development, Inc. (sued
2 erroneously as Bioclinical Development, Inc.), subject to and without waiver of
3 their challenges to the assertion of personal jurisdiction over them, and together
4 with defendants Innovation Ventures, LLC (sued erroneously as Innovation
5 Ventures, LLC dba Living Essentials) and Living Essentials, LLC (collectively,
6 “Defendants”), hereby answer the First Amended Complaint filed by Plaintiffs Ilya
7 Podobedov, Jordan Moussouros and Richard N. James (collectively, “Plaintiffs”)
8 as follows:

9 **GENERAL RESPONSE TO THE FIRST AMENDED COMPLAINT**

10 Defendants state that they respond to these allegations only on behalf of
11 themselves and not on behalf of any other entity. All allegations are denied unless
12 specifically admitted, and any factual averment is admitted only as to the specific
13 facts and not as to any conclusions, characterizations, implications, or speculations
14 contained in the averment or in the First Amended Complaint as a whole.

15 The First Amended Complaint indiscriminately uses the term “Defendants”
16 to refer collectively to all Defendants named in this action. Defendants do not
17 admit that each of them has knowledge of the allegations in the First Amended
18 Complaint, notwithstanding the use of the collective term Defendants in this
19 answer and affirmative defenses. For instance, Bio Clinical Development, Inc.
20 does not distribute, market, promote or advertise any product whatsoever.

21 The First Amended Complaint contains numerous quotations and references
22 that purport to be excerpts from various identified and unidentified sources and
23 documents. Most of the documents and other purported sources referred to in the
24 First Amended Complaint have not been provided by Plaintiffs. Defendants are
25 therefore unable to admit, deny or otherwise challenge the accuracy, veracity or
26 source(s) of these references. To the extent that Defendants state that a document
27 or other material referenced in the First Amended Complaint speaks for itself, or
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1 refers to the document or other material for the contents thereof, such statement,
2 admission or reference does not constitute an admission that the content of the
3 document or other material is or is not true, or that Plaintiffs' characterization of
4 such documents or other material is accurate. Defendants reserve their right to
5 challenge the accuracy of the quotations and references and to raise any objection
6 as to the documents purportedly quoted or referenced. Defendants do not admit the
7 authenticity of any documents or other material from which quotations were
8 purportedly taken or references were made, and reserve the right to challenge the
9 authenticity of all materials purportedly quoted or referenced in the First Amended
10 Complaint.

11 **SPECIFIC ANSWER**

12 **TO THE ALLEGATIONS IN THE FIRST AMENDED COMPLAINT**

13 1. In response to paragraph 1 of the First Amended Complaint,
14 Defendants admit that Plaintiffs purport to bring this action as a class action, define
15 putative classes and define a class period, but deny that this lawsuit is appropriate
16 for class action treatment or is manageable as a class action. Defendants state that
17 the 5-Hour ENERGY[®] promotions, advertisements, press releases and packaging
18 speak for themselves. Defendants otherwise deny each and every allegation
19 contained in paragraph 1.

20 2. In response to paragraph 2 of the First Amended Complaint,
21 Defendants admit that 5-Hour ENERGY[®] contains B-vitamins and amino acids.
22 Defendants state that the 5-Hour ENERGY[®] promotions, advertisements, press
23 releases and packaging speak for themselves and that such promotions,
24 advertisements, press releases and packaging should be read in their entirety and
25 understood in context. Defendants otherwise deny each and every allegation
26 contained in paragraph 2.

27 3. In response to paragraph 3 of the First Amended Complaint,
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1 Defendants lack sufficient information to determine what is meant by “several
2 warning letters” and therefore deny the allegations concerning the same.

3 Defendants otherwise deny each and every allegation contained in paragraph 3.

4 4. In response to paragraph 4 of the First Amended Complaint,
5 Defendants deny each and every allegation contained therein.

6 5. In response to paragraph 5 of the First Amended Complaint,
7 Defendants deny each and every allegation contained therein.

8 6. In response to paragraph 6 of the First Amended Complaint,
9 Defendants state that the allegations set forth therein state legal conclusions to
10 which no response is required. Defendants otherwise deny each and every
11 allegation contained in paragraph 6.

12 7. In response to paragraph 7 of the First Amended Complaint,
13 Defendants state that the allegations set forth therein state legal conclusions to
14 which no response is required. Defendants otherwise deny each and every
15 allegation contained in paragraph 7, except admit that Plaintiffs purport to bring
16 this action as a class action and define putative classes, but deny that this lawsuit is
17 appropriate for class certification or is manageable as a class action.

18 8. In response to paragraph 8 of the First Amended Complaint,
19 Defendants state that they are presently without sufficient knowledge or
20 information to form a belief as to the truth of the allegations contained therein, and
21 on that basis deny the allegations.

22 9. In response to paragraph 9 of the First Amended Complaint,
23 Defendants state that they are presently without sufficient knowledge or
24 information to form a belief as to the truth of the allegations contained therein, and
25 on that basis deny the allegations.

26 10. In response to paragraph 10 of the First Amended Complaint,
27 Defendants state that they are presently without sufficient knowledge or
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1 information to form a belief as to the truth of the allegations contained therein, and
2 on that basis deny the allegations.

3 11. In response to paragraph 11 of the First Amended Complaint,
4 Defendants admit that Innovation Ventures, LLC is a limited liability company
5 created by and under the laws of the State of Michigan, and headquartered in the
6 City of Farmington Hills, County of Oakland, State of Michigan. Defendants also
7 admit that Innovation Ventures, LLC was formed in 2000. Defendants further
8 admit that defendant Innovation Ventures, LLC owns the 5-Hour Energy[®]
9 trademark. Defendants also admit that Innovation Ventures, LLC has sold 5-Hour
10 Energy[®] and Chaser[®]. Defendants admit that Mr. Bhargava is an officer and
11 member of Innovation Ventures, LLC. Defendants further admit that Mr.
12 Bhargava is a citizen and resident of the State of Michigan. Defendants otherwise
13 deny each and every allegation contained in paragraph 11.

14 12. In response to paragraph 12 of the First Amended Complaint,
15 Defendants admit that Living Essentials, LLC is a limited liability company created
16 by and under the laws of the State of Michigan, and headquartered in the City of
17 Farmington Hills, County of Oakland, State of Michigan. Defendants otherwise
18 deny each and every allegation contained in paragraph 12.

19 13. In response to paragraph 13 of the First Amended Complaint,
20 Defendants admit that defendant Bhargava is a resident of Michigan. Defendants
21 also admit that Mr. Bhargava is an officer and member of Innovation Ventures,
22 LLC. Defendants admit that Mr. Bhargava is the owner of Bio Clinical
23 Development, Inc. Defendants further admit that Mr. Bhargave was a creator of
24 ChaserPlus[®] Defendants otherwise deny each and every allegation contained in
25 paragraph 13, including the allegations that Mr. Bhargava makes “personal
26 appearances throughout the United States including the State of California.”

27 14. In response to paragraph 14 of the First Amended Complaint,
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1 Defendants admit that Bio Clinical Development, Inc. is Michigan corporation with
2 its principal place of business in Farmington Hills, County of Oakland, State of
3 Michigan. Defendants also admit that Mr. Bhargava is the owner of Bio Clinical
4 Development, Inc. Defendants further admit that Bio Clinical Development, Inc. is
5 the holding company for the patents for 5-Hour ENERGY[®]. Defendants otherwise
6 deny each and every allegation contained in paragraph 14.

7 15. In response to paragraph 15 of the First Amended Complaint,
8 Defendants state that it purports to state a legal conclusion for which no response is
9 required. Defendants otherwise deny each and every allegation contained therein.

10 16. In response to paragraph 16 of the First Amended Complaint,
11 Defendants state that it purports to state a legal conclusion for which no response is
12 required. Defendants otherwise deny each and every allegation contained therein.

13 17. In response to paragraph 17 of the First Amended Complaint,
14 Defendants state that it purports to state a legal conclusion for which no response is
15 required. Defendants otherwise deny each and every allegation contained therein.

16 18. In response to paragraph 18 of the First Amended Complaint,
17 Defendants state that the allegations set forth therein state legal conclusions to
18 which no response is required. Defendants otherwise deny each and every
19 allegation contained in paragraph 18.

20 19. In response to paragraph 19 of the First Amended Complaint,
21 Defendants state that the allegations set forth therein state legal conclusions to
22 which no response is required. Defendants otherwise deny each and every
23 allegation contained in paragraph 19.

24 20. In response to paragraph 20 of the First Amended Complaint,
25 Defendants deny each and every allegation as it pertains to defendant Bhargava and
26 defendant Bio Clinical Development, Inc. The remaining of Paragraph 20 of the
27 First Amended Complaint states legal conclusions to which no response is
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1 required.

2 21. In response to paragraph 21 of the First Amended Complaint,
3 Defendants state that the allegations set forth therein state legal conclusions to
4 which no response is required. Defendants otherwise deny each and every
5 allegation contained in paragraph 21.

6 22. In response to paragraph 22 of the First Amended Complaint,
7 Defendants admit that 5-Hour ENERGY[®] was introduced in or about 2004.
8 Defendants also admit that the serving size for a 5-Hour ENERGY[®] shot is 1.93
9 ounces and that it is categorized as a “dietary supplement.” Defendants otherwise
10 deny each and every allegation contained in paragraph 22.

11 23. In response to paragraph 23 of the First Amended Complaint,
12 Defendants admit that 5-Hour ENERGY[®] products are available for sale
13 individually, as well as in six-packs and twelve-packs. Defendants also admit that
14 the 5-Hour Energy[®] website sells multipacks. As to the remainder of the
15 allegations in paragraph 23, Defendants state that they are presently without
16 sufficient knowledge or information to form a belief as to the truth of the
17 allegations contained therein, and on that basis deny the allegations.

18 24. In response to paragraph 24 of the First Amended Complaint,
19 Defendants admit that 5-Hour ENERGY[®] comes in “a number of fruit flavors.
20 Defendants also admit that 5-Hour Energy[®] comes in original, decaf and extra-
21 strength varieties. Defendants otherwise deny each and every allegation contained
22 in paragraph 24.

23 25. In response to paragraph 25 of the First Amended Complaint,
24 Defendants state that the First Amended Complaint does not specify what it means
25 by “net sales,” and, as a result, Defendants are presently without sufficient
26 knowledge or information to form a belief as to the truth of the allegations
27 contained in the first sentence of paragraph 25, and on that basis deny the
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1 allegations. The First Amended Complaint does not identify what is meant by the
2 “energy shot market” and Defendants are presently without sufficient knowledge or
3 information to form a belief as to the truth of this allegation and on that basis deny
4 it. Defendants admit that, on average, nine million 5-Hour ENERGY[®] bottles are
5 sold per week. Defendants otherwise deny each and every allegation contained in
6 paragraph 25.

7 26. In response to paragraph 26 of the First Amended Complaint,
8 Defendants admit that 5-Hour ENERGY[®] is marketed via several diverse channels,
9 including television and radio commercials, internet websites, print media, event
10 promotions and endorsements. Defendants otherwise deny each and every
11 allegation contained in paragraph 26.

12 27. In response to paragraph 27 of the First Amended Complaint,
13 Defendants admit that the product’s name is 5-Hour ENERGY[®]. Defendants
14 otherwise deny each and every allegation contained therein.

15 28. In response to paragraph 28 of the First Amended Complaint,
16 Defendants deny each and every allegation contained therein, except admit that the
17 5-Hour ENERGY[®] packaging speaks for itself.

18 29. In response to paragraph 29 of the First Amended Complaint,
19 Defendants state that the packaging for 5-Hour ENERGY[®] speaks for itself.
20 Defendants otherwise deny each and every allegation contained in paragraph 29.

21 30. In response to paragraph 30 of the First Amended Complaint,
22 Defendants deny each and every allegation contained therein.

23 31. In response to paragraph 31 of the First Amended Complaint,
24 Defendants state that the television commercials speak for themselves. Defendants
25 otherwise deny each and every allegation contained therein.

26 32. In response to paragraph 32 of the First Amended Complaint,
27 Defendants state that the 5-hour ENERGY[®] promotions, advertisements, press
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1 releases and packaging speak for themselves. Defendants otherwise deny each and
2 every allegation contained therein.

3 33. In response to paragraph 33 of the First Amended Complaint,
4 Defendants state that the 5-Hour ENERGY[®] packaging speaks for itself.
5 Defendants otherwise deny each and every allegation contained in paragraph 33.

6 34. In response to paragraph 34 of the First Amended Complaint,
7 Defendants state that the promotions, advertisements, press releases and packaging
8 speak for themselves. Defendants further state that plaintiffs have not identified
9 the dates, places or the sources for the alleged representations, thereby prohibiting
10 Defendants from either admitting or denying the allegations and on that basis,
11 Defendants deny each and every allegation contained in paragraph 34.

12 35. In response to paragraph 35 of the First Amended Complaint,
13 Defendants admit that 5-Hour ENERGY[®] has “(a)s much caffeine as a cup of the
14 leading premium coffee” and that Extra Strength 5-Hour ENERGY[®] “contains as
15 much caffeine as 12 ounces of premium coffee premium coffee.” Defendants
16 otherwise deny each and every allegation contained in paragraph 35.

17 36. In response to paragraph 36 of the First Amended Complaint,
18 Defendants state that they are presently without sufficient knowledge or
19 information to form a belief as to the truth of the allegations contained therein, and
20 on that basis deny the allegations.

21 37. In response to paragraph 37 of the First Amended Complaint,
22 Defendants state that the commercial speaks for itself.

23 38. In response to paragraph 38 of the First Amended Complaint,
24 Defendants state that the commercial speaks for itself.

25 39. In response to paragraph 39 of the First Amended Complaint,
26 Defendants state that the advertisement annexed as Exhibit A to the First Amended
27 Complaint speaks for itself. Defendants otherwise deny each and every allegation
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1 contained in paragraph 39.

2 40. In response to paragraph 40 of the First Amended Complaint,
3 Defendants deny each and every allegation contained therein.

4 41. In response to paragraph 41 of the First Amended Complaint,
5 Defendants state that the advertisements for Decaf 5-Hour ENERGY[®] speak for
6 themselves.

7 42. In response to paragraph 42 of the First Amended Complaint,
8 Defendants admit that a shot of Decaf 5-Hour ENERGY[®] contains 6mg of caffeine.
9 Defendants otherwise deny each and every allegation contained in paragraph 42.

10 43. In response to paragraph 43 of the First Amended Complaint,
11 Defendants admit that Decaf 5-Hour ENERGY[®] “contains 6mg of caffeine” which
12 is about as much as a half cup of decaffeinated coffee. Defendants otherwise deny
13 each and every allegation contained in paragraph 43.

14 44. In response to paragraph 44 of the First Amended Complaint,
15 Defendants admit that Decaf 5-Hour ENERGY[®] “contains B-vitamins for energy
16 and amino acids for focus.” As to the remainder of the allegations in paragraph 44,
17 Defendants state that the advertisements and packaging for Decaf 5-Hour
18 ENERGY[®] speak for themselves. Defendants otherwise deny each and every
19 allegation contained in paragraph 44.

20 45. In response to paragraph 45 of the First Amended Complaint,
21 Defendants deny each and every allegation contained therein.

22 46. In response to paragraph 46 of the First Amended Complaint,
23 Defendants deny each and every allegation contained therein.

24 47. In response to paragraph 47 of the First Amended Complaint,
25 Defendants admit that the National Advertising Division of the Better Business
26 Bureau reviewed advertisements regarding 5-Hour ENERGY[®]. Defendants
27 otherwise deny each and every allegation contained in paragraph 47.

1 48. In response to paragraph 48 of the First Amended Complaint,
2 Defendants admit that a study was performed regarding 5-Hour ENERGY®.
3 Defendants otherwise deny each and every allegation contained in paragraph 48.

4 49. In response to paragraph 49 of the First Amended Complaint,
5 Defendants state that the purported information posted on the website speaks for
6 itself. Defendants otherwise deny each and every allegation contained in paragraph
7 49.

8 50. In response to paragraph 50 of the First Amended Complaint,
9 Defendants state that the information contained in the website and in
10 advertisements speak for themselves. Defendants otherwise deny each and every
11 allegation contained in paragraph 50.

12 51. In response to paragraph 51 of the First Amended Complaint,
13 Defendants state that the First Amended Complaint does not specifically identify
14 the “clinical trial,” thus preventing Defendants from admitting or denying the
15 allegations. Defendants deny each and every allegation contained therein.

16 52. In response to paragraph 52 of the First Amended Complaint,
17 Defendants admit that Marshall-Blum, LLC, conducted research. Defendants state
18 that they are presently without sufficient knowledge or information to form a belief
19 as to the truth of the remaining allegations contained in paragraph 52, and on that
20 basis deny the allegations.

21 53. In response to paragraph 53 of the First Amended Complaint,
22 Defendants admit that the Chaser® product was found to be effective. Defendants
23 state that they are presently without sufficient knowledge or information to form a
24 belief as to the truth of the remaining allegations contained in paragraph 53, and on
25 that basis deny the allegations.

26 54. In response to paragraph 54 of the First Amended Complaint,
27 Defendants state that the First Amended Complaint does not identify the purported
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1 expert or specify the exact nature or content of the purported statements.

2 Defendants therefore are presently without sufficient knowledge or information to
3 form a belief as to the truth of the allegations contained in paragraph 54, and on
4 that basis deny the allegations.

5 55. In response to paragraph 55 of the First Amended Complaint,
6 Defendants state that they are presently without sufficient knowledge or
7 information to form a belief as to the truth of the allegations contained in paragraph
8 55, and on that basis deny the allegations.

9 56. In response to paragraph 56 of the First Amended Complaint,
10 Defendants state that they are presently without sufficient knowledge or
11 information to form a belief as to the truth of the allegations contained in paragraph
12 56, and on that basis deny the allegations.

13 57. In response to paragraph 57 of the First Amended Complaint,
14 Defendants state that the 5-Hour ENERGY[®] website speaks for itself. Defendants
15 further state that they are presently without sufficient knowledge or information to
16 form a belief as to the truth of the remaining allegations contained in paragraph 57,
17 and on that basis deny the allegations.

18 58. In response to paragraph 58 of the First Amended Complaint,
19 Defendants state that this paragraph lacks specificity sufficient to permit
20 Defendants to admit or deny the allegations therein and that they are presently
21 without sufficient knowledge or information to form a belief as to the truth of the
22 allegations contained therein, and on that basis deny the allegations.

23 59. In response to paragraph 59 of the First Amended Complaint,
24 Defendants state that the 5-Hour ENERGY[®] website at
25 <http://www.5hourenergy.com/ingredients.asp> speaks for itself. Defendants
26 otherwise deny each and every allegation contained in paragraph 59.

27 60. In response to paragraph 60 of the First Amended Complaint,
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1 Defendants state that they are presently without sufficient knowledge or
2 information to form a belief as to the truth of the allegations contained in paragraph
3 60, and on that basis deny the allegations.

4 61. In response to paragraph 61 of the First Amended Complaint,
5 Defendants state that they are presently without sufficient knowledge or
6 information to form a belief as to the truth of the allegations contained in paragraph
7 61, and on that basis deny the allegations.

8 62. In response to paragraph 62 of the First Amended Complaint,
9 Defendants state that they are presently without sufficient knowledge or
10 information to form a belief as to the truth of the allegations contained in paragraph
11 62, and on that basis deny the allegations.

12 63. In response to paragraph 63 of the First Amended Complaint,
13 Defendants state that they are presently without sufficient knowledge or
14 information to form a belief as to the truth of the allegations contained in paragraph
15 63, and on that basis deny the allegations.

16 64. In response to paragraph 64 of the First Amended Complaint,
17 Defendants state that they are presently without sufficient knowledge or
18 information to form a belief as to the truth of the allegations contained in paragraph
19 64, and on that basis deny the allegations.

20 65. In response to paragraph 65 of the First Amended Complaint,
21 Defendants state that they are presently without sufficient knowledge or
22 information to form a belief as to the truth of the allegations contained in paragraph
23 65, and on that basis deny the allegations.

24 66. In response to paragraph 66 of the First Amended Complaint,
25 Defendants state that the 5-Hour ENERGY[®] website speaks for itself. Defendants
26 otherwise deny each and every allegation contained in paragraph 66.

27 67. In response to paragraph 67 of the First Amended Complaint,
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1 Defendants state that they are presently without sufficient knowledge or
2 information to form a belief as to the truth of the allegations contained in paragraph
3 67, and on that basis deny the allegations.

4 68. In response to paragraph 68 of the First Amended Complaint,
5 Defendants state that they are presently without sufficient knowledge or
6 information to form a belief as to the truth of the remaining allegations contained in
7 paragraph 68, and on that basis deny the allegations.

8 69. In response to paragraph 69 of the First Amended Complaint,
9 Defendants deny each and every allegation contained therein.

10 70. In response to paragraph 70 of the First Amended Complaint,
11 Defendants deny each and every allegation contained therein.

12 71. In response to paragraph 71 of the First Amended Complaint,
13 Defendants deny each and every allegation contained in paragraph 71.

14 72. In response to paragraph 72 of the First Amended Complaint,
15 Defendants admit that Chaser[®] was introduced to the market. Defendants
16 otherwise deny each and every allegation contained in paragraph 72.

17 73. In response to paragraph 73 of the First Amended Complaint,
18 Defendants state that Exhibit C to the First Amended Complaint speaks for itself.
19 Defendants otherwise deny each and every allegation contained in paragraph 73.

20 74. In response to paragraph 74 of the First Amended Complaint,
21 Defendants state that the Chaser[®] product packaging speaks for itself. Defendants
22 state that paragraph 74 also purports to state a legal conclusion, to which no
23 response is required. Defendants otherwise deny each and every allegation
24 contained in paragraph 74.

25 75. In response to paragraph 75 of the First Amended Complaint,
26 Defendants state that the Chaser[®] website speaks for itself. Defendants otherwise
27 deny each and every allegation contained in paragraph 75.

1 76. In response to paragraph 76 of the First Amended Complaint,
2 Defendants admit that in or about 2002 Chaser[®] for Wine Headaches was
3 introduced. Defendants state that the advertisements and packaging for Chaser[®]
4 for Wine Headaches speaks for itself. Defendants otherwise deny each and every
5 allegation contained in paragraph 76.

6 77. In response to paragraph 77 of the First Amended Complaint,
7 Defendants states that the letter attached as Exhibit D to the First Amended
8 Complaint speaks for itself. Defendants otherwise deny each and every allegation
9 contained in paragraph 77.

10 78. In response to paragraph 78 of the First Amended Complaint,
11 Defendants state that the promotions, advertisements, press releases and packaging
12 for Chaser[®] for Wine Headaches speak for themselves. Defendants otherwise deny
13 each and every allegation contained in paragraph 78.

14 79. In response to paragraph 79 of the First Amended Complaint,
15 Defendants admit that Chaser^{Plus}[®] was introduced in or about 2004. Defendants
16 state that the promotions, advertisements, press releases and packaging for
17 Chaser^{Plus}[®] speak for themselves. Defendants otherwise deny each and every
18 allegation contained in paragraph 79.

19 80. In response to paragraph 80 of the First Amended Complaint,
20 Defendants state that to the extent paragraph 80 purports to state legal conclusions,
21 no response is required. Defendants further state that the websites cited by
22 Plaintiffs speak for themselves. Defendants otherwise deny each and every
23 allegation contained in paragraph 80.

24 81. In response to paragraph 81 of the First Amended Complaint,
25 Defendants admit that Chaser[®] Plus lists calcium carbonate and carbon as inactive
26 ingredients in its label. Defendants further state that the promotions,
27 advertisements, press releases and packaging for Chaser^{Plus}[®] speak for
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1 themselves. Defendants otherwise deny each and every allegation contained in
2 paragraph 81.

3 82. In response to paragraph 82 of the First Amended Complaint,
4 Defendants state that the referenced website speaks for itself. Defendants admit
5 that the Chaser*Plus*[®] website is no longer online. Defendants otherwise deny each
6 and every allegation contained in paragraph 82.

7 83. In response to paragraph 83 of the First Amended Complaint,
8 Defendants state that the FDA regulations speak for themselves. Defendants
9 further state that to the extent paragraph 83 purports to state legal conclusions, no
10 response is required. Furthermore, paragraph 83 does not contain an averment of
11 fact to which an answer is required; to the extent an answer is required, Defendants
12 lack knowledge or information sufficient to form a belief as to the truth of the
13 allegations contained therein.

14 84. In response to paragraph 84 of the First Amended Complaint,
15 Defendants deny each and every allegation contained therein.

16 85. In response to paragraph 85 of the First Amended Complaint,
17 Defendants deny each and every allegation contained therein.

18 86. In response to paragraph 86 of the First Amended Complaint,
19 Defendants admit that 5-Hour ENERGY[®] was introduced in or around 2004.
20 Defendants otherwise deny each and every allegation contained in paragraph 86.

21 87. In response to paragraph 87 of the First Amended Complaint,
22 Defendants state that the trademark registration for 5-Hour ENERGY[®] speaks for
23 itself. Defendants otherwise deny each and every allegation contained therein.

24 88. In response to paragraph 88 of the First Amended Complaint,
25 Defendants deny each and every allegation contained therein.

26 89. In response to paragraph 89 of the First Amended Complaint,
27 Defendants admit that Mr. Bhagarva owns Bio Clinical Development, Inc.
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1 Defendants also admit that Living Essentials' accounting department provides
2 certain accounting support for Bio Clinical Development, Inc., which is charged to
3 and paid for by Bio Clinical Development, Inc. Defendants otherwise deny each
4 and every allegation contained therein.

5 90. In response to paragraph 90 of the First Amended Complaint,
6 Defendants deny each and every allegation contained therein.

7 91. In response to paragraph 91 of the First Amended Complaint,
8 Defendants deny each and every allegation contained therein.

9 92. In response to paragraph 92 of the First Amended Complaint,
10 Defendants otherwise deny each and every allegation contained therein.

11 93. In response to paragraph 93 of the First Amended Complaint,
12 Defendants deny each and every allegation contained therein.

13 94. In response to paragraph 94 of the First Amended Complaint,
14 Defendants state that it purports to state legal conclusions to which no responses
15 are required. Defendants otherwise deny each and every allegation contained
16 therein.

17 95. In response to paragraph 95 of the First Amended Complaint,
18 Defendants state that the allegations set forth therein state legal conclusions to
19 which no response is required. Defendants otherwise deny each and every
20 allegation contained in paragraph 95, except admit that Plaintiffs purport to bring
21 this action on behalf of themselves and others similarly situated, but deny that this
22 lawsuit is appropriate for class certification or is manageable as a class action.

23 96. In response to paragraph 96 of the First Amended Complaint,
24 Defendants state that the allegations set forth therein state legal conclusions to
25 which no response is required. Defendants otherwise deny each and every
26 allegation contained in paragraph 96, except admit that Plaintiffs purport to bring
27 this action as a class action, but deny that this lawsuit is appropriate for class
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1 certification or is manageable as a class action.

2 97. In response to paragraph 97 of the First Amended Complaint,
3 Defendants state that the allegations set forth therein state legal conclusions to
4 which no response is required. Defendants otherwise deny each and every
5 allegation contained in paragraph 97, except admit that Plaintiffs purport to bring
6 this action as a class action, but deny that this lawsuit is appropriate for class
7 certification or is manageable as a class action.

8 98. In response to paragraph 98 of the First Amended Complaint,
9 Defendants state that the allegations set forth therein state legal conclusions to
10 which no response is required. Defendants otherwise deny each and every
11 allegation contained in paragraph 98, except admit that Plaintiffs purport to bring
12 this action as a class action, but deny that this lawsuit is appropriate for class
13 certification or is manageable as a class action.

14 99. In response to paragraph 99 of the First Amended Complaint,
15 Defendants state that the allegations set forth therein state legal conclusions to
16 which no response is required. Defendants otherwise deny each and every
17 allegation contained in paragraph 99, except admit that Plaintiffs purport to bring
18 this action as a class action, but deny that this lawsuit is appropriate for class
19 certification or is manageable as a class action.

20 100. In response to paragraph 100 of the First Amended Complaint,
21 Defendants state that the allegations set forth therein state legal conclusions to
22 which no response is required. Defendants otherwise deny each and every
23 allegation contained in paragraph 100, except admit that Plaintiffs purport to bring
24 this action as a class action, but deny that this lawsuit is appropriate for class
25 certification or is manageable as a class action.

26 101. In response to paragraph 101 of the First Amended Complaint,
27 Defendants state that the allegations set forth therein state legal conclusions to
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1 which no response is required. Defendants otherwise deny each and every
2 allegation contained in paragraph 101, except admit that Plaintiffs purport to bring
3 this action as a class action, but deny that this lawsuit is appropriate for class
4 certification or is manageable as a class action.

5 102. In response to paragraph 102 of the First Amended Complaint,
6 Defendants state that the allegations set forth therein state legal conclusions to
7 which no response is required. Defendants otherwise deny each and every
8 allegation contained in paragraph 102, except admit that Plaintiffs purport to bring
9 this action as a class action, but deny that this lawsuit is appropriate for class
10 certification or is manageable as a class action.

11 103. In response to paragraph 103 of the First Amended Complaint,
12 Defendants state that the allegations set forth therein state legal conclusions to
13 which no response is required. Defendants otherwise deny each and every
14 allegation contained in paragraph 103, except admit that Plaintiffs purport to bring
15 this action as a class action, but deny that this lawsuit is appropriate for class
16 certification or is manageable as a class action.

17 104. In response to paragraph 104 of the First Amended Complaint,
18 Defendants state that the allegations set forth therein state legal conclusions to
19 which no response is required. Defendants otherwise deny each and every
20 allegation contained in paragraph 104, except admit that Plaintiffs purport to bring
21 this action as a class action, but deny that this lawsuit is appropriate for class
22 certification or is manageable as a class action.

23 105. In response to paragraph 105 of the First Amended Complaint,
24 Defendants state that the allegations set forth therein state legal conclusions to
25 which no response is required. Defendants otherwise deny each and every
26 allegation contained in paragraph 105, except admit that Plaintiffs purport to bring
27 this action as a class action, but deny that this lawsuit is appropriate for class
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1 certification or is manageable as a class action.

2 **COUNT I**

3 **VIOLATION OF MAGNUSON-MOSS WARRANTY ACT**

4 **(15 U.S.C. § 2301, *et seq.*)**

5 106. In response to paragraph 106 of the First Amended Complaint,
6 Defendants incorporate by reference their responses to all paragraphs alleged in the
7 First Amended Complaint.

8 107. In response to paragraph 107 of the First Amended Complaint,
9 Defendants state that “Plaintiff James brings this Count I individually and on
10 behalf of the members of the Multi-pack Subclass, against all Defendants” states
11 legal conclusions to which no response is required; Defendants deny such
12 allegation, except admit that Plaintiffs purport to bring this action as a class action,
13 but deny that this lawsuit is appropriate for class certification.

14 108. In response to paragraph 108 of the First Amended Complaint,
15 Defendants state that the allegations set forth therein state legal conclusions to
16 which no response is required. Defendants otherwise deny each and every
17 allegation contained in paragraph 108.

18 109. In response to paragraph 109 of the First Amended Complaint,
19 Defendants state that the allegations set forth therein state legal conclusions to
20 which no response is required. Defendants otherwise deny each and every
21 allegation contained in paragraph 109.

22 110. In response to paragraph 110 of the First Amended Complaint,
23 Defendants state that the allegations set forth therein state legal conclusions to
24 which no response is required. Defendants otherwise deny each and every
25 allegation contained in paragraph 110.

26 111. In response to paragraph 111 of the First Amended Complaint,
27 Defendants state that the allegations set forth therein state legal conclusions to
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1 which no response is required. Defendants otherwise deny each and every
2 allegation contained in paragraph 111.

3 112. In response to paragraph 112 of the First Amended Complaint,
4 Defendants state that the allegations set forth therein state legal conclusions to
5 which no response is required. Defendants otherwise deny each and every
6 allegation contained in paragraph 112.

7 **COUNT II**

8 **BREACH OF EXPRESS WARRANTY**

9 113. In response to paragraph 113 of the First Amended Complaint,
10 Defendants incorporate by reference their responses to all paragraphs alleged in the
11 First Amended Complaint.

12 114. In response to paragraph 114 of the First Amended Complaint,
13 Defendants state that “Plaintiffs bring this Count II individually and on behalf of
14 the members of the nationwide Class against all Defendants” states legal
15 conclusions to which no response is required; Defendants deny such allegation,
16 except admit that Plaintiffs purport to bring this action as a class action, but deny
17 that this lawsuit is appropriate for class certification.

18 115. In response to paragraph 115 of the First Amended Complaint,
19 Defendants deny each and every allegation contained therein.

20 116. In response to paragraph 116 of the First Amended Complaint,
21 Defendants deny each and every allegation contained therein.

22 117. In response to paragraph 117 of the First Amended Complaint,
23 Defendants deny each and every allegation contained therein.

24 118. In response to paragraph 118 of the First Amended Complaint,
25 Defendants deny each and every allegation contained therein.

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COUNT III

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

119. In response to paragraph 119 of the First Amended Complaint, Defendants incorporate by reference their responses to all paragraphs alleged in the First Amended Complaint.

120. In response to paragraph 120 of the First Amended Complaint, Defendants state that “Plaintiffs bring this Count III individually and on behalf of the members of the nationwide Class against all Defendants” states legal conclusions to which no response is required; Defendants deny such allegation, except admit that Plaintiffs purport to bring this action as a class action, but deny that this lawsuit is appropriate for class certification.

121. In response to paragraph 121 of the First Amended Complaint, Defendants deny each and every allegation contained therein.

122. In response to paragraph 122 of the First Amended Complaint, Defendants deny each and every allegation contained therein.

123. In response to paragraph 123 of the First Amended Complaint, Defendants deny each and every allegation contained therein.

COUNT IV

VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW

(Bus. & Prof. Code §§ 17200, *et seq.*)

124. In response to paragraph 124 of the First Amended Complaint, Defendants incorporate by reference their responses to all paragraphs alleged in the First Amended Complaint.

125. In response to paragraph 125 of the First Amended Complaint, Defendants state that “this Count IV is asserted by Plaintiffs Podobedov and James on behalf of the California Subclass under California law” states legal conclusions to which no response is required; Defendants deny such allegation, except admit

1 that Plaintiffs purport to bring this action as a class action, but deny that this
2 lawsuit is appropriate for class certification.

3 126. In response to paragraph 126 of the First Amended Complaint,
4 Defendants state that the allegations set forth therein state legal conclusions to
5 which no response is required. Defendants otherwise deny each and every
6 allegation contained in paragraph 126.

7 127. In response to paragraph 127 of the First Amended Complaint,
8 Defendants state that the allegations set forth therein state legal conclusions to
9 which no response is required. Defendants otherwise deny each and every
10 allegation contained in paragraph 127.

11 128. In response to paragraph 128 of the First Amended Complaint,
12 Defendants state that the allegations set forth therein state legal conclusions to
13 which no response is required. Defendants otherwise deny each and every
14 allegation contained in paragraph 128.

15 129. In response to paragraph 129 of the First Amended Complaint,
16 Defendants state that the allegations set forth therein state legal conclusions to
17 which no response is required. Defendants otherwise deny each and every
18 allegation contained in paragraph 129.

19 130. In response to paragraph 130 of the First Amended Complaint,
20 Defendants state that the allegations set forth therein state legal conclusions to
21 which no response is required. Defendants otherwise deny each and every
22 allegation contained in paragraph 130.

23 131. In response to paragraph 131 of the First Amended Complaint,
24 Defendants deny each and every allegation contained therein, except admit that
25 Plaintiffs and the purported California Subclass seek the relief described therein,
26 but deny that Plaintiffs or the purported California Subclass are entitled to any such
27 recovery.

COUNT V
FOR VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW
("FAL")

(Bus. & Prof. Code §§ 17500 *et seq.*)

132. In response to paragraph 132 of the First Amended Complaint, Defendants incorporate by reference their responses to all paragraphs alleged in the First Amended Complaint.

133. In response to paragraph 133 of the First Amended Complaint, Defendants state that "this Count V is asserted by Plaintiffs Podobedov and James on behalf of the California Subclass under California law" states legal conclusions to which no response is required; Defendants deny such allegation, except admit that Plaintiffs purport to bring this action as a class action, but deny that this lawsuit is appropriate for class certification.

134. In response to paragraph 134 of the First Amended Complaint, Defendants state that the allegations set forth therein state legal conclusions to which no response is required. Defendants otherwise deny each and every allegation contained in paragraph 134.

135. In response to paragraph 135 of the First Amended Complaint, Defendants deny each and every allegation contained therein.

136. In response to paragraph 136 of the First Amended Complaint, Defendants deny each and every allegation contained therein.

137. In response to paragraph 137 of the First Amended Complaint, Defendants deny each and every allegation contained therein.

138. In response to paragraph 138 of the First Amended Complaint, Defendants deny each and every allegation contained therein.

139. In response to paragraph 139 of the First Amended Complaint, Defendants state that the allegations set forth therein state legal conclusions to

1 which no response is required. Defendants otherwise deny each and every
 2 allegation contained in paragraph 139, except admit that Plaintiffs and the
 3 purported California Subclass seek the relief described therein, but deny that
 4 Plaintiffs or the purported California Subclass are entitled to any such recovery.

5 **COUNT VI**

6 **VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT**

7 **("CRLA")**

8 **(Civil Code §§ 1750, *et seq.*)**

9 140. In response to paragraph 140 of the First Amended Complaint,
 10 Defendants incorporate by reference their responses to all paragraphs alleged in the
 11 First Amended Complaint.

12 141. In response to paragraph 141 of the First Amended Complaint,
 13 Defendants state that "this Count VI is asserted by Plaintiffs Podobedov and James
 14 on behalf of the California Subclass under California law" states legal conclusions
 15 to which no response is required; Defendants deny such allegation, except admit
 16 that Plaintiffs purport to bring this action as a class action, but deny that this
 17 lawsuit is appropriate for class certification.

18 142. In response to paragraph 142 of the First Amended Complaint,
 19 Defendants state that the allegations set forth therein state legal conclusions to
 20 which no response is required. Defendants otherwise deny each and every
 21 allegation contained in paragraph 142.

22 143. In response to paragraph 143 of the First Amended Complaint,
 23 Defendants state that the allegations set forth therein state legal conclusions to
 24 which no response is required. Defendants otherwise deny each and every
 25 allegation contained in paragraph 143.

26 144. In response to paragraph 144 of the First Amended Complaint,
 27 Defendants state that the allegations set forth therein state legal conclusions to
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1 which no response is required. Defendants otherwise deny each and every
2 allegation contained in paragraph 144.

3 145. In response to paragraph 145 of the First Amended Complaint,
4 Defendants deny each and every allegation contained therein, except admit that
5 Plaintiffs and the purported California Subclass seek the relief described therein,
6 but deny that Plaintiffs or the purported California Subclass are entitled to any such
7 recovery.

8 146. In response to paragraph 146 of the First Amended Complaint,
9 Defendants state that the allegations set forth therein state legal conclusions to
10 which no response is required. Defendants otherwise deny each and every
11 allegation contained in paragraph 146, except Defendants admit that they received
12 a letter from counsel for Plaintiffs and the other members of the purported classes
13 addressed to it and states that the content of that letter speaks for itself.

14 147. In response to paragraph 147 of the First Amended Complaint,
15 Defendants state that the allegations set forth therein state legal conclusions to
16 which no response is required. Defendants otherwise deny each and every
17 allegation contained in paragraph 147, except admit that Plaintiffs and the
18 purported California Class seek the relief described therein, but deny that Plaintiffs
19 or the purported California Class are entitled to any such recovery.

20 **COUNT VII**

21 **VIOLATION OF NEW YORK DECEPTIVE TRADE PRACTICES ACT**

22 **("DTPA")**

23 **(New York General Business Law §§ 349, *et seq.*)**

24 148. In response to paragraph 148 of the First Amended Complaint,
25 Defendants incorporate by reference their responses to all paragraphs alleged in the
26 First Amended Complaint.

27 149. In response to paragraph 149 of the First Amended Complaint,
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1 Defendants state that “Plaintiffs Podobedov and Moussouros assert this Count VII
2 on behalf of themselves and the New York Subclass” states legal conclusions to
3 which no response is required; Defendants deny such allegation, except admit that
4 Plaintiffs purport to bring this action as a class action, but deny that this lawsuit is
5 appropriate for class certification.

6 150. In response to paragraph 150 of the First Amended Complaint,
7 Defendants state that the allegations set forth therein state legal conclusions to
8 which no response is required. Defendants otherwise deny each and every
9 allegation contained in paragraph 150.

10 151. In response to paragraph 151 of the First Amended Complaint,
11 Defendants deny each and every allegation contained therein.

12 152. In response to paragraph 152 of the First Amended Complaint,
13 Defendants state that the allegations set forth therein state legal conclusions to
14 which no response is required. Defendants otherwise deny each and every
15 allegation contained in paragraph 152.

16 153. In response to paragraph 153 of the First Amended Complaint,
17 Defendants state that the allegations set forth therein state legal conclusions to
18 which no response is required. Defendants otherwise deny each and every
19 allegation contained in paragraph 153.

20 154. In response to paragraph 154 of the First Amended Complaint,
21 Defendants deny each and every allegation contained therein, except admit that
22 Plaintiffs and the purported New York Subclass seek the relief described therein,
23 but deny that Plaintiffs or the purported New York Subclass are entitled to any
24 such recovery.

25 **AFFIRMATIVE DEFENSES**

26 For their affirmative defenses, and without assuming any greater burden of
27 proof than as required by law, Defendants allege as follows:

1 **FIRST DEFENSE**

2 **(Failure to State a Claim)**

3 Plaintiffs and putative class members fail to state a claim upon which relief
4 can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

5 **SECOND DEFENSE**

6 **(Not Proper Class Action)**

7 Plaintiffs' and putative class members' claims alleged in the First Amended
8 Complaint may not be properly certified or maintained as a class action.

9 **THIRD DEFENSE**

10 **(Lack of Standing/Capacity)**

11 Plaintiffs and putative class members lack standing or capacity, or both, to
12 assert some or all of the claims raised in the First Amended Complaint.

13 **FOURTH DEFENSE**

14 **(Preemption)**

15 Plaintiffs' and putative class members' claims are preempted by federal
16 statutory and regulatory law, and/or barred by the Supremacy Clause of the United
17 States Constitution, principals of federalism, and general preemption because the
18 relief sought impermissibly conflicts with and frustrates the purposes of federal
19 regulations and regulatory activity.

20 **FIFTH DEFENSE**

21 **(Abstention)**

22 Plaintiffs' and putative class members' claims should be denied under the
23 equitable doctrine of abstention, because such relief would unreasonably encroach
24 upon federal administrative prerogatives or substitute the Court's oversight for that
25 of federal or state administrative agencies.

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1 **SIXTH DEFENSE**

2 **(First Amendment)**

3 Plaintiffs' and putative class members' claims are barred, in whole or in part,
4 by the First Amendment to the United States Constitution and the applicable
5 provisions under the California Constitution that may apply to this lawsuit which
6 protect the rights to freedom of speech.

7 **SEVENTH DEFENSE**

8 **(No Materiality or Justifiable Reliance)**

9 Plaintiffs' and putative class members' claims are barred, in whole or in part,
10 because any allegedly false statements or omissions allegedly attributable to a
11 defendant (which alleged statements or omissions are denied) were not material
12 and were not detrimentally or justifiably relied upon by Plaintiffs or the putative
13 class members.

14 **EIGHTH DEFENSE**

15 **(Statute of Limitation)**

16 Plaintiffs' and putative class members' claims are barred, in whole or in part,
17 by the applicable statutes of limitations and repose.

18 **NINTH DEFENSE**

19 **(Failure to Allege Statutory Claim)**

20 Plaintiffs and putative class members have failed to allege a statutory claim
21 for deceptive and unfair trade practices, and misleading advertising upon which
22 relief can be granted.

23 **TENTH DEFENSE**

24 **(Damages Too Speculative and Remote)**

25 Plaintiffs' and putative class members' claims are barred, in whole or in part,
26 because the damages sought are too speculative and remote.

1 **ELEVENTH DEFENSE**

2 **(Laches, Estoppel, Waiver, Ratification, Unclean Hands)**

3 Plaintiffs' and putative class members' claims are barred, in whole or in part,
4 by the doctrines of laches, estoppel, equitable estoppel, quasi estoppel, waiver,
5 ratification, or unclean hands.

6 **TWELFTH DEFENSE**

7 **(Compliance)**

8 Plaintiffs' and putative class members' claims are barred, in whole or in part,
9 because any product by a defendant (including any packaging or labeling of its
10 products) is, and always has been, in compliance with all applicable governmental
11 regulations at the time such product was manufactured, packaged, labeled and sold.

12 **THIRTEENTH DEFENSE**

13 **(Conformity with Prevailing Business Practices and Standards)**

14 Plaintiffs' and putative class members' claims are barred, in whole or in part,
15 because the alleged conduct of which Plaintiffs and putative class members
16 complain comported with the prevailing business practices and standards of the
17 industry at issue.

18 **FOURTEENTH DEFENSE**

19 **(Open and Obvious)**

20 Plaintiffs and putative class members are barred from recovering any
21 damages by virtue of the fact that any dangers alleged by Plaintiffs and putative
22 class members, if any, were open and obvious.

23 **FIFTEENTH DEFENSE**

24 **(No Legal Duty)**

25 Plaintiffs' and putative class members' claims are barred, in whole or in part,
26 as to Defendants because Defendants do not owe a legal duty to Plaintiffs and
27 putative class members or, if Defendants owed a legal duty to Plaintiffs and
28

1 putative class members, Defendants did not breach that duty.

2 **SIXTEENTH DEFENSE**

3 **(No Privity)**

4 Plaintiffs' and putative class members' claims are barred, in whole or in part,
5 because Plaintiff and the putative class members lack privity with Defendants.

6 **SEVENTEENTH DEFENSE**

7 **(No Actionable Injury or Proximate Cause)**

8 Plaintiffs' and putative class members' claims are barred, in whole or in part,
9 because neither Plaintiffs nor putative class members suffered any actionable injury
10 or because such injury was not proximately caused by Defendants.

11 **EIGHTEENTH DEFENSE**

12 **(Alleged Injury Caused By Others)**

13 To the extent Plaintiffs and putative class members allege that they were
14 injured or damaged, which injuries and damages are denied, the injuries and
15 damages were caused solely by acts, wrongs, or omissions of persons, entities,
16 forces, or things over which Defendants have no control and for which Defendants
17 are not legally responsible.

18 **NINETEENTH DEFENSE**

19 **(No Joint and Several Liability)**

20 Plaintiffs and putative class members are not entitled to relief jointly and
21 severally and Defendants are not jointly and severally liable with any other
22 defendant or any other person or entity with respect to the claims asserted by
23 Plaintiffs and putative class members.

24 **TWENTIETH DEFENSE**

25 **(Good Faith, Privilege, Justification)**

26 Plaintiffs' and putative class members' claims are barred, in whole or in part,
27 because the acts or omissions alleged to have been performed by Defendants, or
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1 either of them, if performed at all, were done in good faith and/or were privileged
2 or justified.

3 **TWENTY-FIRST DEFENSE**

4 **(No Harm or Damages Suffered)**

5 Plaintiffs' and putative class members' claims are barred, in whole or in
6 part, because neither Plaintiffs nor any other member of the putative class has
7 suffered actual harm, injury in fact, or lost money or property as a result of a
8 violation of California Business & Professions Code Section 17200, *et seq.*, or
9 under any other cause of action in this case.

10 **TWENTY-SECOND DEFENSE**

11 **(Business Necessity)**

12 Plaintiffs' and putative class members' claims are barred, in whole or in part,
13 because the acts or omissions alleged to have been performed by Defendants, if
14 performed at all, were performed in accordance with business necessity and for
15 legitimate reasons.

16 **TWENTY-THIRD DEFENSE**

17 **(Voluntary Payment)**

18 Plaintiffs' and putative class members' claims are barred, in whole or in part,
19 by the doctrine of voluntary payment.

20 **TWENTY-FOURTH DEFENSE**

21 **(Failure to Comply With Civil Code Section 1782)**

22 Plaintiffs and putative class members lack standing to pursue some of all of
23 the claims for failure to comply with California Civil Code Section 1782.

24 **TWENTY-FIFTH DEFENSE**

25 **(Offset and Set-Off)**

26 To the extent Plaintiffs and/or the putative class members are entitled to any
27 relief, Defendants are entitled to an offset or set off of such relief for the value of
28

1 the benefits that Plaintiff and the putative class members received.

2 **TWENTY-SIXTH DEFENSE**

3 **(Due Process)**

4 Plaintiffs' and putative class members' claims violate the due process
5 provision of the United States Constitution and the correlative provisions of the
6 California Constitution and the constitutions of the other 49 states to the extent that
7 they seek to deprive Defendants of procedural and substantive safeguards,
8 including traditional defenses to liability.

9 **TWENTY-SEVENTH DEFENSE**

10 **(Adequate Remedy at Law)**

11 Plaintiffs' and putative class members' claims for injunctive and equitable
12 relief are barred because there is an adequate remedy at law.

13 **TWENTY-EIGHTH DEFENSE**

14 **(Failure to Mitigate)**

15 Plaintiffs' and putative class members' claims are barred, in whole or in part,
16 by failure to mitigate.

17 **TWENTY-NINTH DEFENSE**

18 **(Defenses Recognized In Other Jurisdictions)**

19 To the extent that the laws of other jurisdictions apply, Defendants invoke
20 each and every statutory and common law defense available to it under the laws of
21 each of the other forty-nine states, and the District of Columbia, of the United
22 States with respect to each of the claims alleged in the Complaint that is recognized
23 in that jurisdiction.

24 **THIRTIETH DEFENSE**

25 **(Failure to Join Indispensable Parties)**

26 This action is barred in whole or in part because Plaintiffs and putative class
27 members failed to join indispensable parties to this litigation.

1 **THIRTY-FIRST DEFENSE**

2 **(Ongoing Conduct)**

3 This action is barred in whole or in part because Plaintiffs do not sufficiently
4 allege continuing misconduct by Defendants for purposes of relief under California
5 Business and Professions Code § 17200 *et seq.*

6 **THIRTY-SECOND DEFENSE**

7 **(No False Advertising)**

8 Plaintiffs' and putative class members' claims are barred in whole or part
9 because Defendants' business practices and advertising relating to its products as
10 described in the First Amended Complaint were not and are not unfair, unlawful, or
11 fraudulent within the meaning of California Business and Professions Code §
12 17200 *et seq.* Defendants' practices and advertising were not deceptive or did not
13 tend to deceive, and were not unfair or deceptive practices under the CLRA, and
14 did not tend to have nor did in fact have the capacity to deceive under California
15 Business and Professions Code § 17500 *et seq.*

16 **THIRTY-THIRD DEFENSE**

17 **(Lack of Personal Jurisdiction)**

18 The purported claims set forth in the First Amended Complaint are barred
19 because this Court lacks personal jurisdiction over some or all of Defendants.

20 **THIRTY-FOURTH DEFENSE**

21 **(Warranties Were Disclaimed)**

22 Plaintiffs' and putative class members' purported breach of warranty claims
23 fail because all such warranties, if any at all, were validly disclaimed by
24 Defendants.

25 **THIRTY-FIFTH DEFENSE**

26 **(Commercial Speech)**

27 The statements and representations alleged in Plaintiffs' and putative class
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1 members' First Amended Complaint were mere sales talk that no reasonable person
2 would rely upon or mistake as a factual claim.

3 **THIRTY-SIXTH DEFENSE**

4 **(Safe Harbor)**

5 The conduct, practices, statements and representations alleged in Plaintiffs'
6 and putative class members' First Amended Complaint were explicitly approved, or
7 exempted from prosecution, by law or statute.

8 **THIRTY-SEVENTH DEFENSE**

9 **(No Violation of Borrowed Statute)**

10 The conduct, practices, statements and representations alleged in Plaintiffs'
11 First Amended Complaint have no violation of an underlying or "borrowed" statute
12 to support a section 17200 claim.

13 **RESERVATION OF RIGHTS**

14 In addition, Defendants have not completed their investigation and discovery
15 regarding Plaintiffs' and putative class members' First Amended Complaint or the
16 claims asserted by Plaintiffs therein. Accordingly, Defendants reserve the right to
17 assert such additional affirmative defenses as necessary based on such ongoing
18 investigation and discovery.

19 **Prayer**

20 WHEREFORE, Defendants pray for judgment as follows:

- 21 1. That Plaintiffs and putative class members' take nothing from
22 Defendants by reason of their First Amended Complaint;
- 23 2. That the First Amended Complaint against Defendants be dismissed
24 with prejudice;
- 25 3. That Defendants be awarded their costs and attorney's fees incurred to
26 defend this suit; and
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1 4. That Defendants be awarded any other and further relief as the Court
2 may deem just and proper.

3 **JURY DEMAND**

4 Defendants demand trial by jury on all issues that are triable to a jury.

5
6 DATED: April 27, 2012

CRONE HAWXHURST LLP

7
8 By /s/ Gerald E. Hawxhurst

9 Gerald E. Hawxhurst
10 Attorneys for Defendants
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